Filed 11/17/09 Vu v. Superior Court CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LUKE VU, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; RALPHS GROCERY COMPANY, et al., Real Parties in Interest.	No. B213988 (Super. Ct. No. BC392904)

ORIGINAL PROCEEDINGS; application for a writ of mandate. Gregory Alarcon, Judge. Petition for writ of mandate granted.

Harris & Kaufman and Matthew A. Kaufman for Petitioner.

No appearance for Respondent.

Reed Smith, Linda S. Husar and Steven B. Katz for Real Parties in Interest.

SUMMARY

The plaintiff filed a class action against his employer, alleging the employer had violated the Labor and Business and Professions Codes by denying meal and rest periods and then failing to pay wages due as a result. The employer moved to compel arbitration, asserting the plaintiff was bound by a written arbitration agreement. In opposition, the plaintiff argued the purported agreement, which precluded all class, collective and representative actions (among other limitations), was unconscionable on multiple grounds and therefore unenforceable; at the very least, he urged, he should be granted a continuance to conduct discovery pursuant to *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 463. The trial court granted the petition to compel arbitration, and the plaintiff filed a petition for writ of mandate. Because the employer's arbitration agreement contains multiple defects and is unenforceable as a result, we grant the petition for writ of mandate as this matter should proceed in a court of law.

FACTUAL AND PROCEDURAL SYNOPSIS

In June 2008, Luke Vu, individually and on behalf of all other similarly situated individuals, filed a complaint against Ralphs Grocery Company and the Kroger Company (collectively, Ralphs), alleging causes of action for (1) failure to provide meal breaks, (2) failure to provide rest breaks, (3) statutory waiting time penalties for failure to pay wages pursuant to Labor Code section 203 and (4) unlawful business practices in violation of Business and Professions Code section 17200 et seq.

According to Vu's complaint, Ralphs owns, operates, manages and controls about one hundred supermarkets in California, which include licensed retail pharmacy stores open to the general public. From May 31, 2007, to the present, Vu has been employed by Ralphs as a licensed pharmacist.

Vu alleged representation of two classes: (1) All current and former non-exempt licensed pharmacists employed by Ralphs at any time within the four years preceding the filing of his complaint who worked in excess of five hours per workday in one or more

workdays without receiving one or more 30-minute *meal* break(s); and (2) All current and former non-exempt licensed pharmacists employed by Ralphs at any time within the four years preceding the filing of his complaint who worked in excess of five hours per workday in one or more workdays without receiving one or more daily *rest* break(s).

Throughout the statutory period, Vu alleged, Industrial Welfare Commission Wage Order No. 4-2001 (the Wage Order), "Professional, Technical, Clerical, Mechanical and Similar Occupations," as amended, contained in Title 8 of the California Code of Regulations, required every employer to authorize and permit all employees to take meal breaks and rest breaks.

More particularly, pursuant to Labor Code section 512, subdivision (a), "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived."

Further, pursuant to the Wage Order and Labor Code section 226.7, failure by an employer to provide an employee a 10-minute paid rest break for every four hours (or major fraction thereof) worked will require the employer to pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day the employee fails to take the required rest period.[1] Citing *Murphy v. Kenneth Cole*

---

[1] Pursuant to Labor Code section 226.7, subdivision (a), "No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission."

Productions, Inc. (2007) 40 Cal.4th 1094, Vu stated, this one additional hour of pay required under Labor Code section 226.7, subdivision (b), is considered a "premium wage."

In his first cause of action for failure to provide meal breaks, Vu alleged, notwithstanding these provisions, he and all other class members worked for more than five hours each day without being allowed to take the mandatory 30-minute meal break required under California law. Similarly, in support of his second cause of action for failure to provide rest breaks, Vu alleged he and all other class members worked for more than four hours each day without being allowed to take a 10-minute paid rest break as required by California law. To the contrary, he said, Ralphs required its employee pharmacists to regularly work through their meal periods and rest breaks as a condition of maintaining their employment.

In connection with each of these two causes of action, Vu alleged Ralphs owed him and all class members wages in excess of $25,000, plus interest, and attorney's fees and costs as authorized by Labor Code section 218.5. His third and fourth causes of action sought statutory waiting time penalties and further damages for failure to pay wages in connections with the breaks he was denied.

Ralphs filed a petition to compel arbitration, asserting Vu had agreed to arbitrate all employment-related disputes. In support of its petition, Ralphs submitted the declaration of Bonnie Franco, Director of Employee Relations and Human Resources Administration, stating Vu had commenced his employment with Ralphs on May 31, 2007. Her declaration referenced an attached employment application bearing Vu's signature with a date of June 1, 2007 (although the application date typed on the first page is "05/11/2007").

A single-spaced paragraph in the middle of page five of the nine-page document specifies: "MANDATORY FINAL & BINDING ARBITRATION. I acknowledge and understand that [Ralphs] has a Dispute Resolution Program that includes a Mediation &

Binding Arbitration Policy (the 'Policy') applicable to all employees and applicants for employment . . . . I acknowledge, understand and agree that the Policy is incorporated into this Employment Application by this reference as though it is set forth in full [except for any 'Excluded Dispute' arising under 'any applicable CBA']. . . ." The paragraph further stated Vu acknowledged, understood and agreed he would be bound by the mediation and binding arbitration policy, he would be treated as an employee, 'there are no judge or jury trials of any Covered Disputes permitted under the Policy,' and he "ha[d] received a copy of the Policy or one has been made available to me through the Company's Director of Personnel and Benefits, 1100 West Artesia Boulevard, Compton, CA 90220, Telephone (310) 884-4642 or (800) 272-5747, Fax (310) 884-2571[,] e-mail personnel@ralphs.com[.]"

"As part of the employment application process," Franco said, "all prospective employees of Ralphs are given, and are requested to complete and sign, an Employment Application," which includes among other things an agreement to be bound by the Mediation and Binding Arbitration Policy. Citing Vu's signature (dated June 1, 2007) on page 5 of his employment application, Franco said, Vu acknowledged he had received, read and understood Ralphs's written policies as well as the Mediation and Binding Arbitration Policy.

As a further exhibit to Franco's declaration, Ralphs submitted a separate four-page, single-spaced document entitled "Ralphs Grocery Company Dispute Resolution Program Mediation & Binding Arbitration Policy." "Ralphs . . . and its employees and applicants . . . must resolve employment-related disputes through and in accordance with this Dispute Resolution Program ('DRP') Mediation & Binding Arbitration Policy ('Arbitration Policy'). This Arbitration Policy applies to each Employee's employment (or application for employment) and is aimed at resolving employment-related disputes quickly and fairly, to the benefit of everyone involved. . . "

At paragraph 7, the Arbitration Policy specifies that all proceedings are subject to and governed by the Federal Arbitration Act. "[N]either the American Arbitration Association ('AAA') or the Judicial Arbitration & Mediation Services ('JAMS') will be permitted to administer any arbitration held under or pursuant to this Arbitration Policy." Pursuant to paragraph 8, the Federal Rules of Civil Procedure will govern the proceedings. "**However, there is no right or authority for any Covered Dispute(s) to be heard or arbitrated on a class or collective action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other Ralphs employees (or any of them), or of other persons or entities alleged to have common claims**. . . . Thus, even though the FRCP applies as set forth above, **there are no judge or jury trials and there are no class or collective actions or Representative Actions permitted under this Arbitration Policy.**"

Under paragraph 9, "in the event that the applicable statute of limitations period as provided under governing law is longer than one year, and is of the type that can be shortened by contractual agreement, [Ralphs] and Employees agree that the applicable statute of limitations period is shortened to one year. . . ."

"Each party to the arbitration will pay the fees for his, her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law. Ralphs (or any of them who are parties to the arbitration proceedings) in all cases where required by settled and controlling legal authority will pay up to all of the Qualified Arbitrator's and arbitration fees, as apportioned by the Qualified Arbitrator at the outset of the arbitration proceedings in accordance with such legal authority and after the parties have received notice and an opportunity to be heard on the subject. In all instances in which there is a dispute over the apportionment of the Arbitrator's or arbitration fees, such dispute is a Covered Dispute under this Arbitration Policy which must be resolved only by the Qualified Arbitrator. In the event settled and controlling legal authority does

not require that one party or another bear a greater share of the Qualified Arbitrator's or arbitration fees, such fees shall be apportioned equally between each set of adverse parties. If there is any dispute regarding the identification of settled and controlling legal authority, decisions of the United States Supreme Court shall be deemed controlling over any decision of any state or lower federal court."

Paragraph 11 provides (in pertinent part): "The Qualified Arbitrator will be empowered to award any party to the arbitration proceedings any remedy at law or in equity that the party would otherwise have been entitled to had the matter been litigated in a court or before a government agency with jurisdiction over the matter. For example, general, special and punitive damages, injunctive relief, costs and attorneys fees may be awarded if the applicable law provides for them. The authority to award any remedy, however, is subject to whatever limitations on such remedies exist under applicable law. Therefore, the Qualified Arbitrator will have no power, authority or jurisdiction to hear any Covered Dispute(s) as any type of Representative Action, to award any type of remedy or relief for any covered Dispute(s) in connection with any type of Representative Action or to interpret, apply or modify this Arbitration Policy in any manner that would empower or authorize the Qualified Arbitrator to do so." In addition, "Except and only to the extent it may be required by applicable law, the parties and the Qualified Arbitrator shall maintain the existence, content and outcome of any arbitration proceedings held pursuant to this Arbitration Policy in the strictest confidence and shall not disclose the same without the prior written consent of all parties."

Pursuant to paragraph 13, "This Arbitration Policy may not be modified except in writing, or as otherwise expressly permitted by this Arbitration Policy or controlling law. The submission of an application for employment, acceptance of employment or continuation of employment with [Ralphs] by an Employee after notice of this Arbitration Policy is deemed the Employee's acceptance of this Arbitration Policy . . . .

No signature by an Employee or the Company is required for this Arbitration Policy to apply to Covered Disputes."

In his opposition, Vu argued (1) Ralphs had failed to meet its burden of proving the existence of a valid arbitration agreement; (2) the agreement was unconscionable and therefore unenforceable on multiple grounds—bans on class and representative actions, lack of mutuality, shortened statutes of limitations, limits on discovery through a stifling confidentiality provision, imposition of half the costs of arbitration on the employee and the prohibition against arbitration providers who have their own rules that interfere with the unfair provisions in the Ralphs Arbitration Policy; and (3) he should be able to conduct discovery to address the factors addressed in *Gentry v. Superior Court*, *supra*, 42 Cal.4th 443 if necessary.[2] After hearing argument and taking the matter under submission, the trial court granted the petition to compel arbitration, finding the parties had agreed to arbitrate "all matters arising out of the construction of the project referred to in the contract [sic]." Further, the court stated, the matter arose out of the employment relationship; Vu had no evidence he did not sign the agreement to arbitrate or that he did not have access to the dispute resolution policy; and the Franco declaration established all prospective employees are given a copy of the agreement, new hires are required to acknowledge receipt and Vu's agreement to arbitrate was signed as part of his application.

---

[2] In support of Vu's opposition, his attorney (Matthew Kaufman) submitted a declaration addressing typical arbitrators' fees (about $4,000 per day) and estimating the cost to arbitrate Vu's claims both individually and as a class action. He attached copies of AAA and JAMS rules for arbitration of employment disputes, including "Minimum Standards for Procedural Fairness." He stated defense counsel acknowledged the existence of additional versions of the Ralphs Arbitration Policy (and noted our mention of multiple versions of the Ralphs Arbitration Policy in *Massie v. Ralphs Grocery* (May 14, 2007, B321144 [nonpub. opn.])). He also said defense counsel had objected Vu's discovery was moot as he intended to file a petition to compel arbitration, and the parties had stipulated that Vu's outstanding written discovery would be withdrawn without prejudice to permit the arbitration issues to be addressed.

Vu filed a petition for writ of mandate with this court. We issued an order to show cause, Ralphs filed its return and Vu filed his reply.

DISCUSSION[3]

In his petition, Vu argues the arbitration agreement is both procedurally and substantively unconscionable on multiple grounds and should not be enforced as a result.[4] We agree.

---

[3] As a threshold matter, we reject Ralphs's assertion Vu's petition should be denied as procedurally infirm. (*Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 161 [where matters ordered arbitrated are not within the scope of an enforceable arbitration agreement, appellate court may properly review the trial court's order compelling arbitration by writ of mandate]; see also *Medeiros v. Superior Court* (2007) 146 Cal.App.4th 1008, 1014, fn. 8.)

[4] Vu also argues the arbitration agreement does not comply with the minimum procedural safeguards identified in *Armendariz v. Foundation Health PsychCare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*), and says the trial court ignored its duty to weigh the factors regarding the enforceability of a class action waiver as discussed in *Gentry v. Superior Court, supra,* 42 Cal.4th 443, and to permit discovery in this regard if necessary. (See *Franco v. Athens Disposal Company* (2009) 171 Cal.App.4th 1277, 1289 (*Franco*) ["'The kind of inquiry a trial court must make [in deciding whether to invalidate a class arbitration waiver] is similar to the one it already makes to determine whether class actions are appropriate;" this inquiry "does not include consideration of the merits or sufficiency of a plaintiff's cause of action"].)

Under *Gentry,* regardless of whether an arbitration agreement is procedurally unconscionable (notwithstanding the unconscionability analysis discussed in the text), the trial court must invalidate a class action waiver if it concludes such a waiver impermissibly interferes with unwaivable statutory rights by considering (1) the modest size of the potential individual recovery, (2) the potential for retaliation against members of the class, (3) the fact absent members of the class may be uninformed about their rights and (4) other real world obstacles to the vindication of class members' rights through individual arbitration. (*Gentry, supra,* 42 Cal.4th at pp. 451, 463, 467; see also *Franco, supra*, 171 Cal.App.4th at p. 1294 ["to the extent *Gentry* may be limited to unwaivable statutory rights, it applies here because . . . the meal and rest period laws cannot be waived"].) Because we do not rely on this "rule of *Gentry*" to resolve Vu's petition, we need not address Ralphs's argument that, notwithstanding our Supreme Court's decisions to the contrary (*Gentry v. Superior Court, supra,* 42 Cal.4th at p. 465; *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 163-173), this rule is preempted.

"[U]nder both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [Citations.]" (*Armendariz v. Foundation Health PsychCare Services, Inc.* (2000) 24 Cal.4th 83, 98, fn. omitted.) Unconscionability is one such ground. (Civ. Code, § 1670.5, subd. (a).) The party opposing arbitration bears the burden of proving an arbitration provision unconscionable. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.)

Unconscionability includes both procedural and substantive elements. (*Armendariz, supra,* 24 Cal. 4th at p. 114.) "The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. . . . [¶] Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided." (*Discover Bank* (2005) 36 Cal.4th 148, 160, citation and internal quotations omitted.) "The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz, supra,* 24 Cal.4th at p. 114.)

Ralphs concedes that the procedural element of the unconscionability analysis is met in this case, acknowledging "'all prospective employees of Ralphs's . . . are required to agree to [the Dispute Resolution Policy and Arbitration Policy] in writing," and "Vu was required to agree to individual arbitration as a condition of his employment." "An arbitration agreement that is an essential part of a 'take it or leave it' employment condition, without more, is procedurally unconscionable." (*Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 114, citing *Armendariz, supra,* 24 Cal.4th at pp. 113-115.)

The arbitration agreement is also substantively unconscionable on multiple grounds. For the reasons addressed in *Olvera v. El Pollo Loco, Inc.* (2009) 173

Cal.App.4th 447, 457, an action brought by a general manager involving overtime and meal break claims, the class arbitration waiver in this case is substantively unconscionable because it purports to insulate Ralphs from all employee class actions and class arbitrations as it applies not only to pharmacists like Vu but to all employees of Ralphs and is also unfairly one-sided. (*Id.* at p. 457 [high degree of procedural unconscionability of an employment arbitration agreement as a whole, along with the substantive unconscionability of a class arbitration waiver (even in the absence of any evidence from the plaintiff), rendered that provision unconscionable; "[i]n light of our conclusion, we need not decide whether the class arbitration waiver is unenforceable under the rule from *Gentry, supra,* 42 Cal.4th 443"].)

Further, as explained in *Franco v. Athens Disposal Company, Inc.* (2009) 171 Cal.App.4th 1277, another case involving meal and rest breaks, where the arbitration agreement not only contains a class arbitration waiver but also prohibits an employee from acting as a private attorney general, "the agreement as a whole is tainted with illegality and is unenforceable." [5] (*Id.* at p. 1302; see also *Armendariz, supra,* 24 Cal.4th at p. 124 ["If the central purpose of the contract is tainted with illegality, then the contract

---

[5] In fact, the agreement seemingly advises the employee that representative actions are not permitted under the law and that, in precluding such actions, the arbitration provision simply comports with existing law: "The Qualified Arbitrator will be empowered to award any party to the arbitration proceedings *any remedy at law or in equity that the party would otherwise have been entitled to had the matter been litigated in a court* or before a government agency with jurisdiction over the matter. For example, general, special and punitive damages, injunctive relief, costs and attorneys fees may be awarded if the applicable law provides for them. The authority to award any remedy, however, is *subject to whatever limitations on such remedies exist under applicable law. Therefore, the Qualified Arbitrator will have no power, authority or jurisdiction to hear any Covered Dispute(s) as any type of Representative Action, to award any type of remedy or relief for any Covered Dispute(s) in connection with any type of Representative Action or to interpret, apply or modify this Arbitration Policy in any manner that would empower or authorize the Qualified Arbitrator to do so.*" (¶ 11, italics added.)

as a whole cannot be enforced. [¶] . . . [M]ultiple defects [two, in *Armendariz*] indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage"].)

Here, not only does Ralphs purport to prohibit all employee class, private attorney general and representative actions, but in the same agreement it touts as "fair[]" and for "the benefit of everyone involved," the agreement mandates confidentiality as to the "existence, content and outcome" of any proceeding (see *Davis v. O'Melveny & Meyers* (2007) 485 F.3d 1066, 1079 [similar confidentiality provision "too broad," "contrary to public policy," and therefore substantively unconscionable under California law]); prohibits arbitration before providers maintaining their own procedural safeguards in conflict with the limitations Ralphs seeks to impose (see *Martinez v. Master Protection Corp., supra,* 118 Cal.App.4th 107 [American Arbitration Association refused to conduct employment arbitration pursuant to agreement containing similar deficiencies]); attempts to shorten the limitations period (and thus limit available damages) and impose arbitration costs and fees on employees (see *id.* at p. 116 [under *Armendariz,* it is the *risk* the employee may bear substantial costs, not just the actual imposition of costs that may discourage an employee from exercising the constitutional right of due process]); and provides Ralphs may modify the agreement so long as it does so in writing or otherwise allows itself to do pursuant to its own policy (see *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1173, 1179; *Circuit City Stores, Inc. v. Mantor* (9th Cir. 2003) 335 F.3d 1101, 1107), among other one-sided provisions.

"Given the lack of choice and the potential disadvantages that even a fair arbitration system can harbor for employees, we must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement. 'Private arbitration may resolve disputes faster and cheaper than judicial proceedings. Private arbitration, however, may also become an instrument of injustice imposed on a "take it or leave it"

basis. The courts must distinguish the former from the latter, to ensure that private arbitration systems resolve disputes not only with speed and economy but also with fairness.' [Citation.]" (*Armendariz, supra,* 24 Cal.4th at p. 115.) Here, "multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." (*Id.* at p. 124.) This is not a close case.[6] Because the arbitration agreement is permeated by unconscionability, it is unenforceable.[7] (*Ibid.*)

DISPOSITION

Let a peremptory writ of mandate issue directing the trial court to vacate its order granting Ralphs's petition to compel arbitration and to issue a new and different order denying the petition. Vu shall recover his costs in this original proceeding.

WOODS, J.

We concur:

PERLUSS, P.J **JACKSON, J.**

---

6 Ralphs does not argue that any unconscionable provisions should be severed and the rest of the arbitration agreement enforced and has not indicated it would seek to arbitrate even if particular offending provisions were severed. (See *Olvera v. El Pollo Loco, Inc., supra,* 173 Cal.App.4th 458 ["failure to argue the issue on appeal [is] a waiver of any claim of error regarding severability"].)

7 In light of this determination, we need not address Vu's further arguments in support of his petition.